Supreme Court, U.S.
FILED

03 - 4 JUN 23 2003

No.

In the
Supreme Court of the United States

WILLIAM SMITH,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the Illinois Appellate Court, First District, Sixth Division

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For over seven decades the United States district courts and the federal courts of appeals have infused the Due Process Clause of the Fourteenth Amendment while considering whether to reincarcerate an individual after an inadvertent release from prison. Those courts considering questions surrounding reincarceration have developed two separate, but related theories or doctrines (waiver of jurisdiction because of gross inaction and/or time credit for the years spent reestablishing a law-abiding lifestyle). The Illinois Appellate Court's decision in this case conflicts with settled federal precedent by declining to give consideration to either recognized theory.

The question presented is whether, consistent with the Due Process Clause of the Fourteenth Amendment, the State of Illinois is prohibited because of its gross inaction from seeking petitioner's reincarceration after 22-years of living a law-abiding and useful lifestyle?

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PETITION FOR WRIT OF CERTIORARI

To: The Chief Justice and Associate Justices of the United States Supreme Court. May it please the court:

William Smith (hereafter Mr. Smith or petitioner), respectfully petitions for a writ of certiorari to review the judgment of the Illinois Appellate Court, First District, in this case.

OPINION BELOW

The unpublished opinion and judgment of the Illinois Appellate Court, First District, was filed on August 23, 2002 (App. 1a-8a). A timely petition for rehearing was denied on September 16, 2002 (App. 9a).

JURISDICTION

The decision of the Illinois Appellate Court, First District, was rendered on August 23, 2002 (App. 1a-8a). The Appellate Court rejected petitioner's petition for rehearing on September 16, 2002 (App. 9a). The petitioner sought discretionary review in the Illinois Supreme Court via a Petition for Leave to Appeal which was denied on February 5, 2003 (App. 10a). Thereafter petitioner filed a motion for reconsideration (with exhibits) which was denied by the Illinois Supreme Court on April 7, 2003 (App. 11a). On April 16, 2003, Justice Stevens granted petitioner an extension of time until July 7, 2003 to timely file a Petition for Writ of Certiorari (App. 16a). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTION, STATUTES AND RULES

The Fifth Amendment to the U.S. Constitution, in part, states:

> No person shall be . . . [nor] be deprived of life, liberty or property, without due process of law . . .

The Fourteenth Amendment to the U.S. Constitution, in part, states:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Supreme Court Rule 609(b) (in pertinent part) states:

> If an appeal is taken from a judgment following which the defendant is sentenced to imprisonment . . . the defendant may be admitted to bail and the sentence or condition of imprisonment . . . stayed, with or without bond, by a judge of the trial or reviewing court.

725 ILCS 5/110-10(f) states:

> If the defendant is admitted to bail after conviction the conditions of the bail bond shall be that he will, in addition to the conditions set forth in subsections (a) and (b) hereof: [*(a) and (b) have no application to this petition*]
>
> (1) Duly prosecute his appeal; (2) Appear at such time and place as the court may direct; (3) Not depart this State without leave of court; (4) comply with such reasonable conditions as the court may impose; and (5) if the judgment is affirmed or the

cause reversed and remanded for a new trial, forthwith surrender to the officer from whose custody he was bailed.

STATEMENT

1. **History of Litigation.** Petitioner and a co-defendant, Michael Gillespie (Gillespie), were charged with burglary and possession of burglary tools in the Circuit Court of Cook County, Criminal Division under Indictment 77 C 2197. They were jointly tried and convicted by a Cook County jury on April 14, 1978. Petitioner's bond was revoked and on May 17, 1978 he was sentenced to eight years in custody (C. 4). On April 20, 1979, a panel of the Illinois Appellate Court, First District, granted petitioner's motion for bail, pending appeal, and he was released from an Illinois prison after serving a little over one-year of the imposed sentence (C. 5). On September 12, 1980, the Illinois Appellate Court affirmed the Smith-Gillespie burglary convictions, 88 Ill.App.3d 897, 410 N.E.2d 973.

2. The Illinois Appellate Court's mandate *issued* to the Clerk of the Circuit Court of Cook County on March 10, 1981 with a copy to petitioner's appellate counsel (the Cook County Public Defender; C. 43; Supp.R. 9). The Appellate Court mandate was filed on March 24, 1981 (C. 5). The record below reveals that the appellate mandate as to Gillespie (only) was "spread of record" and a no-bail warrant issued (C. 5). However, over nineteen years later (*November 27, 2000*) the State of Illinois (for the first time) sought the issuance of a mittimus (surrender order) for petitioner (C. 6, 15-16). The record fails to disclose whether petitioner was served with the November 27, 2000 order. On December 20, 2000, the Circuit Court of Cook County issued a warrant for petitioner's arrest. On January 26, 2001, upon learning of the arrest

warrant, petitioner surrendered, and filed a petition for writ of habeas corpus pursuant to 735 ILCS 5/10-101, *et seq*. (West 2000), also requesting bail pending [the] local habeas proceedings (C. 6, 18-22, 24-31). The habeas petition was docketed under petitioner's original 1977 indictment (77 C 2197) and petitioner was enlarged upon the posting of $2500.00 as ordered by the Circuit Court of Cook County. The State opposed habeas relief. On July 12, 2001, the Circuit Court of Cook County denied petitioner's habeas petition, while ordering that petitioner's bail be continued, pending appeal.

3. Petitioner challenged habeas rejection in the Illinois Appellate Court, First District. On August 23, 2002, the Illinois Appellate Court the Cook County Circuit Court (App. 1a-8a). Thereafter petitioner sought appellate rehearing and, when that was denied, sought discretionary review in the Illinois Supreme Court. The Illinois Supreme Court denied discretionary review on February 5, 2003 (App. 10a). Petitioner, through new counsel, filed a motion for reconsideration in the Illinois Supreme Court which the Illinois Supreme Court denied petitioner's motion for reconsideration on April 7, 2003 (App. 11a).

4. **Petitioner's Life Since Approximately 1981**. Petitioner, age 58, has lived openly under his own name in Cook County, Illinois for the last 22-years. He, with his wife, son and mother-in-law, have lived for the last 11-years in their mortgaged home at 7908 South 86th Street, Justice, Illinois. Prior to 1991, petitioner and his family resided in rental apartment units in the Village of Justice, Illinois (petitioner always using his correct name and identification).

Petitioner has (and continues) to work for the Public Works Department in the Village of Justice, a job he has held since 1983 (App. 12a-13a). In addition, petitioner volunteered for the "Meals on Wheels" program which

involved delivering food and services to senior and incapacitated citizens in Justice (and when the funding for "Meals on Wheels" was eliminated, he [on his own] continued to provide those services to several seniors in Justice; App. 12a-13a). Beyond his full-time employment, for the last four years, petitioner has been caring for an elderly Alzheimers patient (visiting with her 7-days-a-week, 5-times a day) (App. 14a-15a).

Assembling a kaleidoscope of factors—or components of an exemplary life—the State of Illinois will necessarily concede that petitioner's incarceration at this late date would serve no useful purpose. Indeed, he is a perfect candidate for [continued] freedom vs- Illinois penitentiary custody (said custody would serve only to undermine the exemplary family, community and employment history established over the last two decades).

REASONS FOR GRANTING THE WRIT

1. The petition should be granted because the decision of the Illinois Appellate Court conflicts with settled precedent from United States District Courts and federal Courts of Appeals opinions, which infuse Due Process Clause-Fourteenth Amendment considerations when reviewing cases strikingly similar to the case at hand. In point of fact, the decision below cites no federal authority, and similar federal decisions were not the subject of cogitation by the Illinois Appellate Court.

As this argument will demonstrate several federal decisions consider the Due Process Clause while distilling dual theories of relief (described as "time credit or credit for time served" and "waiver of jurisdiction" based on bureaucratic gross inaction). Both the federal district and appellate courts developed the "waiver of jurisdiction" doctrine reflecting circumstances where the govern-

ment (or its state analog) "by its inaction [was] so grossly negligent that it would be unequivocally inconsistent with fundamental principles of liberty and justice to require a legal sentence to be served in the aftermath of such . . . inaction" (supporting citational reference, *infra*). The "time credit" theory considers circumstances where an individual may have been inadvertently released from custody (again infusing gross negligence and/or inaction) and, thereafter, re-establishes his or her life by becoming a law-abiding individual (family, employment and community service). Under the "time credit" theory the reviewing court simply determines that the years spent as a law-abiding citizen are theoretically credited to the original term of imprisonment. Both doctrines blend social reality with a legal philosophy which prohibits the sovereign from reincarcerating the re-established citizen.

The primary federal constitutional questions impleaded within the fabric of this petition urge the court to consider whether the State's inaction was so grossly negligent that requiring petitioner to serve an Illinois prison sentence (after 22-years of being gainfully employed, living a law-abiding lifestyle with his family, and serving his community) is inconsistent with fundamental principles of liberty and justice in violation of the Fourteenth Amendment's due process protection against arbitrary and capricious State action? Stated otherwise, is there a waiver of jurisdiction based on the State's gross negligence and/or is the petitioner entitled to "time credit" for the 22 years he has spent re-establishing himself and living down his past?

2. United States District Court decisions including *Lanier v. Williams*, 361 F.Supp. 944 (E.D. N.C. 1973) and *United States v. Merritt*, 478 F.Supp. 804 (D.C. 1979), support petitioner's *mien* in this case. The facts in *Lanier* disclosed that the petitioner was inadvertently released

from a North Carolina prison in 1967 following his reincarceration for parole violations. In 1968, the Sheriff of Davidson County, North Carolina made inquiries with the Department of Corrections to determine if *Lanier* was wanted. The multiple inquiries resulted in the penal system's failure to locate records showing that *Lanier* was still wanted in connection with the service of an 8-to-10 year sentence.

Approximately 5-years later (May 1972) the North Carolina Department of Corrections determined that *Lanier* had been inadvertently released and took him into custody. *Lanier* sought habeas relief pursuant to 28 U.S.C. § 2254 and the district court granted the writ, explaining:

> A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Certainly a prisoner should have his chance to re-establish himself and live down his past. Yet, under the strict rule contended for by the warden, a prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on *ad libitum*, with the result that he is left without even a hope of beating his way back. *It is our conclusion that where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violations of conditions of parole, that his sentence continues to run while he is at liberty.* * * * This court is of the opinion that the "waiver theory" is more consistent than the "credit theory" with the principle that a prisoner cannot be required to serve his sentence in installments. Once the state, *through acts or omissions of its officials,* has led a person, through no fault of his own, to believe that he is free of a prison

> sentence, *and makes no attempt for a prolonged period of years to reacquire custody over him*, that person should be able to rely on the state's action *or inaction* and assume that further service of the sentence will not be exacted of him. The state should not later be heard to assert a right to custody over the person whom it has so misled, and to permit the state to do so offends the Due Process Clause of the Constitution. This court is of the opinion that the State of North Carolina has *waived its right to any further jurisdiction* and custody over the petitioner in regard to the sentences of eight to ten years imposed by the Johnston County Superior Court on April 15, 1964.

361 F.Supp. at 947 (quotation marks and ital. emph. added; supporting citations omitted).

The Illinois Bail Enactment compels the defendant to surrender forthwith upon conviction affirmation but fails to include a notification provision (reproduced at pp. 2-3, *ante*). Petitioner, like Mr. Lanier, remained in contact with the court system. Petitioner contends that he called the Clerk of the Circuit Court of Cook County, leaving his new address during the 1980s when he and his family moved from one apartment to another in the Village of Justice. In approximately 1990, he and his family purchased a home where they reside to this date and he similarly forwarded that address to the Cook County Circuit Court Clerk. Petitioner maintains that he was never advised by any court employee or official that he was wanted for anything.

In *United States v. Merritt*, *ante*, the court considered somewhat similar facts while granting relief pursuant to 28 U.S.C. § 2255. *Merritt* pled guilty to a bank larceny offense that had occurred in 1967, and on June 1, 1973, the district court imposed a sentence of 1 to 3 years to run

consecutive to a state sentence *Merritt* was serving. The federal judgment order was lodged as a detainer with the Maryland authorities, but they failed to notify the U.S. Marshal when *Merritt* was paroled to a halfway house during the summer of 1976. Between August 1976 and June 1979 *Merritt* became a useful, law-abiding citizen (he married, had a child, adopted a handicapped child, started his own business and became active in his local church).

The district court, while granting relief, examined several factors which included [that] the action of the authorities had to rise to the level exceeding simple negligence and the situation brought about by defendant's release and "reincarceration" would "needlessly jeopardize his long term adjustment to society, disrupt both his family and family life, and destroy his economic base, all for no purpose other than to secure blind obedience to the 1973 sentence as it was then imposed," 478 F.Supp. at 807, 808, n. 14 omitted.[1]

Juxtaposing *Lanier* (5-years elapsed from inadvertent release to reincarceration) and *Merritt* (3 years of law-abiding conduct between release and reincarceration), with petitioner's case, our situation reveals that petitioner has 22 or more years of reintegration into his community, he married, has an adult child, has had (and continues to have) the same employment for over 20-years and has united with his community by virtue of multiple charitable activities; App. 12a-15a). Either of the recognized theories supporting relief (time credit after inadvertent release or jurisdictional waiver—each bottomed on the Due Process Clause) compel a finding in this case that the

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[1] The district court also explained that while "waiver of jurisdiction" and "credit toward his sentence" for the period following his release provide different theoretical bases for their conclusions, "these conclusions do not differ in practice." *Id.* at 807 (explanatory citations omitted).

lower court erred in rejecting relief. As explained in *United States v. Merritt*, blind obedience to the 1978 sentence would serve no purpose other than to "needlessly jeopardize petitioner's long-term adjustment to society, disrupt his family and family life and destroy his economic base."

3. The federal courts of appeals have recognized both theories, while alternately granting or rejecting habeas relief. For example, in *Shields v. Beto*, 370 F.2d 1003 (5th Cir. 1967), the court reversed habeas rejection where 28-years elapsed between the petitioner's service of a Louisiana prison sentence and a detainer issued by the State of Texas. In part, the Fifth Circuit explained:

> In the present petition for habeas corpus Shields alleges that he is entitled to nis release and his continued incarceration under the 1933 Texas convictions is in violation of his rights under the due process clause of the Fourteenth Amendment of the United States Constitution. The question we must decide is whether after more than 28 years of inaction on the part of the State of Texas relative to the unexpired term of Shields's 1933 convictions, he may now on conviction of a new felony in Texas be required to serve the balance of time on these old sentences. Do the circumstances of this case, therefore, offend the constitutional precepts of due process stated in the Fourteenth Amendment?
>
> The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice. *Buchalter v. People of the State of New York*, 319 U.S. 427, 63 S.Ct. 1129, 87 L.Ed. 1492 (1943). It exacts from the states a conception of fundamental justice. *Foster*

v. People of State of Illinois, 332 U.S.. 134, 67 S.Ct. 1716, 91 L.Ed. 1955 (1947).

* * * * * * *

Thus we hold that the extraditing of Shields to Louisiana authorities and the release by Texas of the prisoner before expiration of his sentence constituted *a waiver of jurisdiction* over Shields, especially where the surrendering sovereign (Texas) showed no interest in the return of the prisoner, either by agreement between the sovereigns, by detainer, or any other affirmative action taken by it following his release in Louisiana. A prisoner cannot be required to serve his sentence in installments. *White v. Pearlman*, 10 Cir., 1930, 42 F.2d 788.

The lack of interest in Shields by the State of Texas from the date he was released to the Louisiana authorities in 1934 until 1962 when again convicted in Texas, a lapse of more than 28 years, was equivalent to a pardon or commutation of his sentence and *a waiver of jurisdiction*. The Jasper County state judge, therefore, lacked authority to require Shields to complete service of the sentences under the old 1933 convictions, which action constituted a denial of due process under the Fourteenth Amendment to the United States Constitution.

370 F.2d at 1003, 1005-06 (ital. emph. added). Thus, the Fifth Circuit, cited this Court's holdings in *Buchalter v. People of the State of New York*, 319 U.S. 427, 63 S.Ct. 1129 (1943) and *Foster v. People of State of Illinois*, 332 U.S. 134, 67 S.Ct. 1716 (1947), to demonstrate that the Due Process Clause stands violated where the State (or its agencies) act in an arbitrary fashion.

The Court of Appeals for the Eighth Circuit considered the Due Process Clause in *Shelton v. Ciccone*, 578 F.2d 1241 (8th Cir. 1978). In *Shelton*, the court reversed and remanded the denial of habeas relief where *Shelton* asserted that more than 7-years elapsed between the time his sentence was imposed and when he was arrested to commence the service of his sentence. On appeal from district court habeas rejection, *Shelton* asserted, *inter alia*, that there was a "jurisdictional waiver" by the government having failed to act in a reasonably timely fashion. While vacating the denial of habeas relief, the Eighth Circuit explained that the primary issue was whether the circumstances surrounding the government's failure to apprehend *Shelton*, if true, were sufficient to establish that the government "waived jurisdiction" over *Shelton*, 578 F.2d at 1244. The court went on to explain the "waiver" theory:

> The waiver theory was developed by the Court of Appeals for the Fifth Circuit in *Shields v. Beto*, 370 F.2d 1003, 1005 (1967] and thereafter refined in *Piper v. Estelle*, 485 F.2d 245, 246 (5th Cir. 1973). Distilled to its essence, the theory provides that in order to establish waiver, * * * it is not sufficient to prove official conduct that merely evidences a lack of eager pursuit or even arguable lack of interest. Rather the waiving state's action must be so affirmatively wrong or *its inaction so grossly negligent that it would be unequivocally inconsistent with "fundamental principles of liberty and justice" to require a legal sentence to be served in the aftermath of such action or inaction. Piper v. Estelle*, 485 F.2d 245, 246 (5th Cir. 1973).
>
> * * * * * * *
>
> *The waiver theory* encourages responsibility and accountability on the part of the Marshals to the

> extent that it deters the arbitrary exercise of their power. In addition, the theory encourages the prompt rehabilitation of defendants. It is based on the philosophy that a defendant should be allowed to do his time, live down his past, and reestablish himself. Permitting a sentence to go unexecuted does not encourage rehabilitation. *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930). The instant case demonstrates the problem. At the time of his arrest in April, 1977, Shelton was living openly under his own name and was gainfully employed. The arrest interrupted his reintegration into the community. See, *Lanier v. Williams*, 361 F.Supp. 944, 946 (E.D. N.C. 1973).
>
> The fundamental principle of a petition for a writ of habeas corpus is that "government must always be accountable to the judiciary for a man's imprisonment" and that the restraints on liberty must be removed if the imprisonment does not conform to the basic requirements of law. *Fay v. Noia*, 372 U.S. 391, 401-402, 83 S.Ct. 822, 829, 9 L.Ed.2d 837 (1963).

578 F.2d at 1244, 1245 (ital. emph. added).

In *White v. Pearlman*, 42 F.2d 788 (1930), the Tenth Circuit affirmed the granting of habeas relief where *Pearlman* was released from a Texas prison in error. Prior to release, *Pearlman* brought the release-error to the warden's attention, but the Texas state prison warden insisted that the paperwork supported release. Two-years later *Pearlman* learned he was wanted and surrendered to the authorities. He was recommitted and filed a habeas corpus petition which was granted by the district court. On the warden's appeal, the Tenth Circuit affirmed, explaining that "He cannot be required to serve it [his sentence] in installments," * * * "[a] prisoner should have his chance

to re-establish himself and live down his past. Yet, under the strict rule contended for by the warden, a prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on *ad libitum*, with the result that he is left without even a hope of beating his way back," 42 F.2d at 789.

It is pristine that the State of Illinois (and/or the Cook County, Illinois bureaucracies) was either "so affirmatively wrong or *its inaction so grossly negligent that it would be unequivocally inconsistent with fundamental principles of liberty and justice to require a legal sentence to be served in the aftermath of such action or inaction*," *Shelton, ante*, 578 F.2d at 1244 (ital. emph. added); see also *Rhodes v. Chapman*, 452 U.S. 337, 352, 101 S.Ct. 2392, 2402, 69 L.Ed.2d 59 (1981) ("identifying "goals of the penal function in the criminal justice system" as "to punish justly, to deter future crime, *and to return imprisoned persons to society with an improved change of being useful, law-abiding citizens*,") (ital. emph. added).

Petitioner implores the Court consider his case through [a] lens of reality. For the last twenty or more years he has lived, openly, in Justice, Illinois maintaining his home, family and a full-time municipal job—in addition to participating in the local "Meals on Wheels" program and caring for an aged Alzheimer victim. Thus, he advances his Fourteenth Amendment-Due Process Clause-contentions predicated on the primary proposition that the State of Illinois (and/or its Cook County counterparts) through its/their gross negligence, "waived" its/their jurisdiction in a senseless ongoing effort to obtain an additional few years in an Illinois prison.

In a later Eighth Circuit case, *Camper v. Norris*, 36 F.3d 782 (8th Cir. 1994), the court rejected habeas relief where the petitioner asserted that a 4-year delay in the execution of his sentence violated due process. The *Camper*

facts were decidedly different than those at hand. *Camper* was convicted of robbery in 1988 and was released on bond, pending appeal. While his appeal was pending he was imprisoned for an unrelated parole violation and again released in January 1989. *Camper's* 1988 conviction was affirmed in November 1989, but a bureaucratic *faux pas* delayed reincarceration. However, the original trial judge, after learning that *Camper* had not served the 1988 sentence, ordered an investigation which resulted in *Camper's* arrest in January 1994.

The district court granted habeas relief finding that the State was grossly negligent in allowing over 4-years to elapse. Even while reversing the district court's habeas order, the Eighth Circuit recognized the "waiver" theory—meaning that the "State's conduct may result in the waiver of its jurisdiction over a criminal defendant"—based on the Fourteenth Amendment's protection against arbitrary and capricious State action, 36 F.3d at 784. Under the "waiver" theory the petitioner must show that the State's actions "was so affirmatively wrong or *its inaction was so grossly negligent that requiring him to serve his sentence would be unequivocally inconsistent with fundamental principals of liberty and justice,*" 36 F.3d at 784 (ital. emph. added, parallel citations omitted). Unlike petitioner's case, the appellate reversal went on to note that *Camper* knew that his conviction had been affirmed by virtue of testimony taken during the habeas proceeding, 36 F.3d at 784-85.[2]

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[2] The record below is barren of any evidence revealing that petitioner was notified of the 1980 Illinois appellate affirmation. Further, as part of petitioner's municipal employment responsibilities, he assisted in cleaning the Village of Justice-police department offices for the last 15-years. It necessarily blinks-at-reality to think for a moment that petitioner, working under his cor-

(continued...)

4. *An apropos analogy*. In *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999) (*en banc*), the majority rejected habeas relief noting that *Hawkins* had been sentenced to 50-years in prison in 1981 for drug related offenses (in part, the 50-year sentence was based on multiple prior felonies). After 11-years in prison *Hawkins* was mistakenly paroled (while in prison he earned a college degree and had a stable prison work history). After 20-months (*not 20-years*) the North Carolina Parole Commission realized that he had been mistakenly paroled and *Hawkins* was remanded to custody to serve the balance of his sentence, 195 F.3d at 736-37. *Hawkins* sought habeas relief and a Fourth Circuit panel granted relief, 166 F.3d 267. On rehearing by the full court, the panel decision was vacated with the majority holding that the circumstances failed to give rise to a due process violation.

Circuit Judge Murnaghan's compelling dissent maintained that the Due Process Clause of the Fourteenth Amendment applied and that there were special circumstances which demanded that the Fourteenth Amendment be the vehicle for relief. The dissenting opinion then considered the following:

> Consider the following hypothetical, although not implausible scenario: A parolee is not eligible for parole until 2018, but is erroneously released on parole in 1992. The State does not become aware of the error until 2012. *In the meantime, the parolee rebuilds his life during a successful twenty-year reintegration into society. He obtains a job, gets married, and has children*. The State, upon learning of the erroneous release, drags the parolee

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[2] (...continued)
rect name, would be toiling at the local police station every weekend for 15-years if he thought he was exposed to reincarceration.

> back to prison. Under the majority's analysis the parolee has no fundamental right to his continued freedom, nor does his reincarceration shock the conscience of the court. *The parolee thus must return to prison for six years, leaving behind a life and family that he had built over twenty years.*

195 F.3d at 761 (Smith's emph. added).

Circuit Judge Murnaghan's poignant dissent is today's reality precisely describing petitioner's plight today!!

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SIXTH DIVISION
August 23, 2002

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a petition for Rehearing or the disposition of the same.

No. 1-01-2561

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Respondent-Appellee,	)	
v.	)	No. 77 C 2197
WILLIAM SMITH,	)	Honorable William S. Wood
Petitioner-Appellant.	)	Judge Presiding.

ORDER

Petitioner, William Smith, appeals the order of the circuit court denying his petition for a writ of *habeas corpus* based upon the 20-year delay between the order affirming his burglary conviction and the State's motion to issue mittimus. We affirm.

On April 14, 1978, a jury found petitioner guilty of burglary of a jewelry store and possession of burglary tools. On May 17, 1978, the trial court sentenced petitioner to concurrent terms of eight years' imprisonment for burglary and three years' imprisonment for possession of burglary tools. Petitioner appealed.

Petitioner was released on an appeal bond on April 20, 1979. In an opinion filed September 12, 1980, the appellate court affirmed petitioner's convictions and sentences. See *People v. Smith*, 88 Ill.App.3d 897 (1980).

On March 10, 1981. the appellate court's mandate affirming petitioner's convictions and sentences issued to the clerk of the circuit court of Cook County. A copy of the mandate was also sent to the State's Attorney of Cook County and to the Public Defender of Cook County (petitioner having been represented upon appeal by an assistant public defender). The mandate was filed in the circuit court on March 24, 1981.

Petitioner remained free for the next 20 years. On November 27, 2000, the State filed a motion to issue a mittimus to petitioner to serve the required sentence. On December 20, 2000, the circuit court issued an arrest warrant for defendant. On January 26, 2001, petitioner surrendered and filed a petition for a writ of *habeas corpus*.

In his *habeas* petition, petitioner argued for his immediate release based upon the "unreasonable" 20-year delay between the affirmance of his burglary conviction and the State's motion for the issuance of a mittimus. The circuit court denied petitioner's *habeas* petition. Petitioner filed this timely appeal.

The facts are undisputed and no testimony was presented raising an issue of credibility. As a result, a question of law is presented that this court considers *de novo*. *People v. Barrett*, 307 Ill. App.3d 812,813 (1999).

Petitioner cites *People ex rel. Millet v. Woods*, 55 Ill.2d 1 (1973) and *People v. Ripa*, 115 Ill.App.3d 1 (1983) in support of his argument that the circuit court erred in denying his *habeas* petition. In *Millet*, the appellate court affirmed the petitioners voluntary manslaughter conviction and the supreme court denied petitioner's petition for leave to appeal. The supreme court's mandate issued to the appellate court and was filed there; however, the appellate court's mandate was not filed in the circuit court until five years later. *Millet*, 55 Ill.2d at 2.

The supreme court held that the unexplained passage of five years between the filing of the supreme court's mandate in the appellate court and the filing of the appellate court's mandate in the circuit court constituted an "extraordinary circumstance." *Millet*, 55 Ill.2d at 4. During that period of time, petitioner had led a law-abiding life, which included the assumption of the obligations of custody and support for his two minor children following the death of his wife. *Millet*, 55 Ill.2d at 3. Also, at the time the supreme court issued its mandate to the appellate court, the established practice in Cook County was for the State to request the issuance of the appellate court mandate and move that it be spread of record in the circuit court. *Millet*, 55 Ill.2d at 5. The supreme court determined that until this process was completed, petitioner may not fairly be charged with delay. *Millet*, 55 Ill.2d at 5.

Based upon all these factors, the supreme court held that the petitioner's incarceration at such a late date would serve neither the principles of fundamental justice nor the petitioners rehabilitation. *Millet*, 55 Ill.2d at 5. Accordingly, the supreme court affirmed the circuit court's judgment releasing the petitioner from custody pursuant to his petition for *habeas corpus*. *Millet*, 55 Ill.2d at 5.

In the present case, unlike *Millet*, the appellate court's mandate was filed within 6 months after his conviction was

affirmed. Further, a copy of the mandate was sent to the Cook County State's Attorney and to the Cook County Public Defender.

In *Ripa*, the appellate court affirmed defendant's drug convictions, and the mandate was filed in the circuit court on July 9, 1980. *Ripa*, 115 Ill. App. 3d at 2. Defendant's attorney told him that his conviction had been affirmed and that he would receive a letter advising when to surrender to complete his sentence. *Ripa*, 115 Ill. App.3d at 3. Defendant did not receive the letter until January 1982. *Ripa*, 115 Ill.App. 3d at 3. On January 27, 1982, the State filed a motion in the trial court for an order directing defendant to surrender in court to begin serving his sentence. *Ripa*, 115 Ill.App.3d at 2. The trial court granted the motion and directed defendant to appear; he appeared as ordered and filed a petition for *habeas corpus* relief. *Ripa*, 115 Ill.App.3d at 2.

The trial court granted the relief requested, and the State appealed. *Ripa*, 115 Ill.App.3d at 3. Relying upon *Millet*, the appellate court determined that the State had not offered any explanation for the 18½ month delay between the issuance of the mandate and the order to surrender and had not rebutted defendant's evidence that he had changed his lifestyle and become a responsible, law-abiding citizen. *Ripa*, 115 Ill.App.3d at 5. The appellate court noted that the State had not asserted that the defendant had an independent obligation to surrender himself under the terms of his appeal bond. *Ripa*, 115 Ill.App.3d at 5. The appellate court also noted that, upon the advice of his attorney, defendant had waited to be notified by the State to surrender and that such notification apparently was local practice. *Ripa*, 115 Ill.App.3d at 5. Finding the delay between the issuance of the mandate and the order to surrender attributable to the State, the appellate court affirmed the trial court's order grant-

ing defendant's petition for a writ of *habeas corpus*. *Ripa*, 115 Ill.App.3d at 5.

More recently, in *Walker v. Hardiman*, 116 Ill. 2d 413 (1987), our supreme court held that any delay occurring after the mandate was "spread of record" in the circuit court is attributable to the defendant, not the State. *Walker* consolidated two cases involving plaintiffs Jerry Walker and Ronald Stokes. The issue raised in these two cases was whether there had been an unreasonable delay between the pronouncement and imposition of sentence warranting *habeas corpus* relief. *Walker*, 116 Ill.2d at 419. The supreme court held:

> "We believe that this court's decision in *Millet* is dispositive of the issue presented in this appeal because *Millet* makes it clear that once the appellate court mandate is spread of record in the circuit court any delay is attributable to the defendant, not the State.
>
> In both cases herein the appellate court mandate was spread of record in the circuit court within a reasonable time after the denial of petitioners' petitions for leave to appeal, and Walker and Stokes were so notified. In *Walker*, within a month of the denial of the petition for leave co appeal in this court the appellate court mandate was spread of record in the circuit court and Walker's attorney was notified. In *Stokes*, the appellate court mandate was spread of record in the circuit court within one year after this court's denial of petitioners petition for leave to appeal, and Stokes testified that he knew *** that his appeal in this court had been denied. Under our holding in *Millet*, the delay after the [appellate court mandate was spread of record in the circuit court] is chargeable to Walker and Stokes, not the State. We therefore believe

that Walker and Stokes are not entitled to *habeas corpus* relief.

> We do not believe this result is unduly harsh since section [110-10(0(5)] of the Code of Criminal Procedure of 1963 specifically states that a defendant admitted to bail *shall* forthwith surrender upon the affirmance of the judgment against him. A defendant who fails to comply with the conditions of the bail bond statute cannot now avoid service of his sentence by alleging that the State had a duty to notify. No statute requires the State to notify defendants when to surrender." (Emphasis in the original.) *Walker*, 116 Ill.2d at 423-24.

Thus, under *Walker*, the relevant inquiry is when the appellate court mandate was spread of record in the circuit court. *Walker* did not define the phrase "spread of record." In *People v. Tonaldi*, 297 Ill.App.3d 116 (1998), the appellate court noted that the phrase "spread of record" has been used by courts in varying contexts. Some courts have equated filing the mandate with spreading of record: other courts have held that the mandate is spread of record when the defendant has *notice* that the mandate has been filed in the circuit court. *Tonaldi*, 297 Ill.App.3d at 120-21.

Under either definition, the appellate court mandate here was "spread of record" by March 24, 1981, as the mandate was filed in the circuit court on that date and notice was sent to the Cook County State's Attorney and to the Cook County Public Defender. See *People v. Barrett*, 307 Ill.App.3d 812, 814 (1999) (holding that counsel is defendant's agent and acts upon defendant's behalf and that where counsel is sent a copy of an order, knowledge of the order is attributable co defendant.) Further, in his motion for bond, petitioner admitted that his appellate counsel had informed him that his conviction had been affirmed upon appeal.

Thus, the appellate court mandate having been spread of record in the circuit court within 6 months after his conviction was affirmed, the ensuing 20-year delay in petitioner's incarceration was not chargeable to the State. Accordingly, the holding in *Walker* mandates that petitioner's request for *habeas corpus* relief be denied.

Petitioner argues that the appellate court mandate was never spread of record as to him. In support, petitioner notes that: (1) the trial court issued an arrest warrant for his co-defendant Gillespie soon after the mandate was filed, but did not issue an arrest warrant for petitioner until December 20, 2000; (2) after the mandate was filed, the trial court failed to answer three letters from the Illinois Department of Corrections regarding the status of petitioners case; (3) petitioner never received notice of an August 1, 1994, court date; and (4) petitioner never received his appeal bond slips.

Petitioner's arguments are not well-taken. As discussed above, some courts have held that a mandate is spread of record when it is filed in the circuit court; other courts have held that the mandate is spread of record when it is filed in the circuit court and the defendant has notice thereof. *Tonaldi*, 297 Ill.App.3d at 120-21. In the present case, the appellate court mandate was spread of record by March 24, 1981, when the mandate was filed in the circuit court and notice was sent co the State's Attorney and Public Defender. Accordingly, the petitioners petition for *habeas corpus* relief is denied.

Next, petitioner argues that his counsel provided ineffective assistance by failing to advise him of the appellate court's mandate and by failing to advise him to promptly surrender to police. To establish a claim of ineffective assistance, defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability counsel's deficient

performance prejudiced defendant. *People v. Albanese*, 104 Ill.2d 504, 525 (1984).

Initially, we note that defendant's argument is belied by his admission in his motion for bond that his counsel had informed him that his conviction had been affirmed upon appeal. Further, petitioner has failed to show how he was prejudiced in this cause. See *People v. Barrett,* 307 Ill.App.3d at 814 (finding that defendant was not prejudiced by counsel's failure to notify the defendant when to surrender himself, "particularly in light of defendant's freedom on bond for an extended period of time.")

We specifically note that petitioner makes no argument that his counsel's actions prevented him from appealing his case to the supreme court or in any other way prejudiced him: therefore, defendant's ineffective assistance claim fails. See *People v. Pecoraro*, 144 Ill.2d 1. 13 (1991) (court may dispose of ineffective assistance claim upon the ground of lack of sufficient prejudice).

For the foregoing reasons, we affirm the circuit court.

Affirmed.

O'BRIEN. J., with GALLAGHER, P.J., and BUCKLEY, J., concurring.

No. 1-01-2561

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Respondent-Appellee,	)	
v.	)	No. 77 C 2197
WILLIAM SMITH,	)	Honorable William S. Wood
Petitioner-Appellant.	)	Judge Presiding.

ORDER

This cause coming to be heard on the Petition for Rehearing of Appellant, William Smith, this court being fully advised in the premises;

IT IS HEREBY ORDERED that said Petition for Rehearing is ~~ALLOWED~~/DENIED.

/s/ Sheila M. O'Brien
JUSTICE

ORDER ENTERED
SEP 16, 2002
APPELLATE COURT,
FIRST DISTRICT

/s/ Robert Chapman Buckley
JUSTICE

/s/ Michael J. Gallagher
JUSTICE

SUPREME COURT OF ILLINOIS
94998 CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

February 5, 2003

Mr. Joseph A. Parisi
Michael D. Ettinger & Associates, P.C.
10059 South Roberts Road
Suite IA
Palos Hills, IL 60465

No. 94998 People State of Illinois, respondent, v. William Smith, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 2003.

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

Telecommunications Device
for the Deaf
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FIRST DISTRICT OFFICE
20th Floor
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Chicago, IL 60601
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For the Deaf
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April 7, 2003

Mr. Allan A. Ackerman
Attorney at Law
2000 N. Clifton Ave.
Chicago, IL 60614

In re: People State of Illinois, respondent, v. William Smith, petitioner.
No. 94998

Today the following order was entered in the captioned case:

Motion of petitioner for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion Denied.
Order entered by the Court.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

cc: Hon. Lisa Madigan
Hon. Richard A. Devine
Mr. Joseph A. Parisi

THE VILLAGE OF JUSTICE
7800 SOUTH ARCHER ROAD, JUSTICE, ILLINOIS 60458

OFFICE 708-458-2540
FAX 708-458-4542

Melvin D. VanAllen, Jr. President
Kathleen M. Svoboda Clerk
e-mail mayorvoj@aol.com
mayor@villageofjustice.com

From the Office of
Village President

February 22, 2003

To: All concerned parties

Re: William W. Smith

Mr. William W. Smith has been an acquaintance of mine since 1987. We first met when I was a volunteer umpire and coach for the Justice/Willow Springs Little League. Bill was one of the opposing coaches, a position he had held since 1984. He was also in charge of field and building maintenance, including managing the maintenance budget for the league.

Mr. Smith has been a valued employee of the Village of Justice Public Works Department since 1983. In addition to his normal duties of maintaining village streets, sewers and water lines, he has volunteered for many other village programs as well. He has served many hours without compensation at my request since I became Mayor in 1997. He has always offered his time at our annual carnival, selling tickets or serving food and beverages.

Bill is our self-proclaimed animal warden. When there is a problem, he responds with a Public Works vehicle on his own time. He was our only volunteer for Meals on Wheels, delivering hot lunches to senior citizens in town. When our program ended several years ago. Mr. Smith continued to care for one senior citizen on his own, even to this day.

In our time of a shortage in manpower, Bill worked weekends for nearly three years as our Police Department custodian. He did this without overtime compensation, receiving a modest flat fee for his weekend hours.

At one point Mr. Smith had worked for more than six years without using one sick day. He accumulated more than six months of sick days, personal days and compensatory time before we forced him to take time off or accept compensation for the hours.

Since I have known Bill he has always answered any call for help from the Mayor's office, the Village, the senior citizens or the youth of the village. I am proud to refer to him as an example to other employees or to my colleagues from other municipalities.

The entire community will miss his services and performance if he ever leaves our staff or moves from the Village of Justice.

Sincerely,

/s/ Melvin D. VanAllen, Jr.
Melvin D. VanAllen, Jr.
President, Village of Justice

Date: February 2, 2003

Re: Character Reference for William Smith

To Whom a May Concern:

I first became acquainted with Mr. Smith approximately six years ago when be was working for the Village of Justice, Illinois in the Department of Public Works. Mr. Smith, without receiving any additional compensation, volunteered to deliver "Meals on Wheels" to the senior members of the community who were unable to easily prepare meals for themselves. In this capacity, Mr. Smith gained the trust of many members of the community. As evidence of this trust, many gave him keys to their homes so that Mr. Smith could deliver meals when the recipients were unable to answer the door either because of illness or absence.

Mr. Smith took these responsibilities seriously. Rather than just delivering meals, he constantly apprised himself of the condition of his recipients. Two examples illustrate his point. Once, when an elderly resident failed to answer, Mr. Smith investigated, found her unconscious and gave aid. Another time, when Mr. Smith was making a delivery he smelled smoke, and investigated and found the kitchen in flames. Mr. Smith quickly put out the flames and saved the resident's home.

About five years ago, my mother started showing the effects of vascular dementia. Vascular dementia is a progressively debilitating disease that is similar in many respects to Alzheimer's. In its early stages, vascular dementia patients need slight assistance and minor supervision. I arranged for her to have some assistance but no one was completely satisfactory. They were generally unreliable and on some level I never completely trusted any of them. After over a year of disappointing results

attended to find another assistant for my mother. I sought out advice from local civic and religious groups without success. Because I knew of Mr. Smith's outstanding reputation and knowledge of the people in the community, I consulted him in my search.

Mr. Smith volunteered his time, initially once a day, five days a week after he finished his job for the Village. Over the last four years his commitment has increased to five times a day, seven days a week. He gives up his lunch and free time to help out someone in need. His commitment has increased steadily as her disease has progressed. What was once just "checkup in" has progressed to true caregiver status. He now feeds her and takes care of her every need. His patience and kindness are exemplary. He treats her with true respect and most importantly with dignity. These two qualities are exceedingly rare.

Based on my personal knowledge, I find William Smith to be a most trustworthy, reliable and honest individual. He has consistently demonstrated his unselfish commitment to helping others.

Very truly yours,

/s/ Joan Reylek
/s/ Lawrence A. Reylek

Joan Reylek
Lawrence A. Reylek, Esq.
3732 South Parnell Avenue
Chicago, IL 60609
(773) 373-8056

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

AREA CODE 202
479-3011

April 16, 2003

Mr. Allan A. Ackerman
2000 North Clifton Avenue
Chicago, IL 60614

Re: William Smith
v. Illinois
Application No. 02A886

Dear Mr. Ackerman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on April 16, 2003, extended the time to and including July 7, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By: /s/ Sandra E. Spagnola
Sandra Elliott Spagnolo
Assistant Clerk